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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 604

LEIMBACH CONSTRUCTION COMPANY,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
A MUNICIPAL CORPORATION, AND
BETTIE O. SUMMERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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In The

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MAYOR AND CITY COUNCIL OF BALTIMORE,
A MUNICIPAL CORPORATION, AND
BETTIE O. SUMMERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the Court of Appeals of Maryland entered on June 3, 1970, in the above-entitled proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported in 257 Md. 635, 264 A. 2d 109 (1970), and is reprinted in the Appendix hereto, page 1a, et seq.

The opinion of the Baltimore City Court is unreported. It is reprinted in the Appendix hereto, page 9a.

The opinion of the Board of Municipal and Zoning Appeals of Baltimore City is unreported. It is reprinted in the Appendix hereto, page 12a.

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on April 13, 1970. A timely petition for rehearing was denied, and the mandate and final judgment were entered on June 3, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257.

QUESTIONS PRESENTED

The basic question can be stated:

> May the police power of the State of Maryland be exercised in a matter of zoning so as to deprive a property owner of all access to his property and thereby of all use of such property, or is such action so arbitrary, capricious and unrelated to the protection of the health, safety and welfare of the State that, unless just compensation is paid, it is a denial of due process in violation of the Constitution of the United States?

The question arose in the following manner. Petitioner is the owner of two parcels of adjacent land located in the City of Baltimore, State of Maryland, one of which has been classified under the zoning law of the City of Baltimore since 1931 as "Second Commercial", which classification permits a variety of business and commercial uses. The other parcel is zoned "Residential" which permits residential use, but denies any commercial or business use. Both parcels are undeveloped. They were acquired by the Petitioner at a cost of $38,000.

The parcel of land zoned Second Commercial is "landlocked" in that it has no access to a public street and is bounded on the westerly and northerly sides by the lines of the Penn Central Railroad Company, on the easterly side by privately owned commercially developed property, and on the southerly side by a stream known as Maiden Choice Run which separates it from a public street of the City of Baltimore, Primson Avenue. The second parcel zoned Residential lies southerly of Maiden Choice Run and has frontage on Primson Avenue. At one time there was a bridge connecting Primson Avenue across the Run which gave access to the commercial property. The bridge fell into disrepair some years ago, was closed and barricaded by the City of Baltimore, and the City has refused to repair or rebuild the bridge on the land owned by it. A plat is attached to the opinion of the Court of Appeals of Maryland and is reprinted in the Appendix, page 7a.

Petitioner applied to the City of Baltimore to have it rebuild the bridge, which application was refused. Petitioner then applied to the appropriate department of the City for permission to construct an access road on its residentially classified property adjacent to the former bridge and to build a new bridge on its own property so as to provide a connection to the public street, Primson Avenue.

A hearing was held by the appropriate authority, the Board of Municipal and Zoning Appeals of Baltimore City (the Board) at which time the issues presented were, first, the proper construction of the zoning law of Baltimore City as to whether an access road was a "business use" forbidden in a residential zone, and, second, whether the refusal in the present circumstances to permit the construction of an access road amounted to a denial of all use of Petitioner's commercial property and amounted to a taking of the property without due process. The Board refused the permit on

the basis that it was a "business use" (13a), but did not answer the question of whether the effect of this decision would be a denial of all use of the property.

This decision was appealed to the Baltimore City Court in which Court the same two issues were presented. The Court affirmed the Board without stating the basis for its ruling on the constitutional issue presented (9a).

An appeal was taken to the Court of Appeals of Maryland which affirmed the decision of the Baltimore City Court.

It appears affirmatively in the decision of the Board of Municipal and Zoning Appeals (13a) and the decision of the Baltimore City Court (9a) and in the opinion of the Court of Appeals of Maryland (5a) that the issue has been raised at all stages of whether the property is deprived of all access unless the permit is issued.

A Motion for Reargument was filed in which the question was again specifically raised that, unless the City of Baltimore changed the position, repeated by the City Solicitor at the time of argument, whereby it refused to rebuild the bridge, then the refusal of the requested permit to the Petitioner to build an access road and bridge on its own property would be a taking of property in violation of the Fifth Amendment to the Constitution of the United States and in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Article 23 of the Declaration of Rights of the State of Maryland. The Motion for Reargument was denied without opinion.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States

Fifth Amendment:

> "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private

property be taken for public use, without just compensation."

Fourteenth Amendment:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Maryland

Declaration of Rights:

Article 23. Due Process.

"That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

STATEMENT OF THE CASE

A. *Facts*

Petitioner is the owner of two parcels of adjacent land located in the City of Baltimore, State of Maryland, one of which has been classified under the zoning law of the City of Baltimore since 1931 as "Second Commercial", which classification permits a variety of business and commercial uses. The other parcel is zoned "Residential" which permits residential use, but denies any commercial or business use. Both parcels are undeveloped. They were acquired by the Petitioner at a cost of $38,000.

The parcel of land zoned Second Commercial is "landlocked" in that it has no access to a public street and is bounded on the westerly and northerly sides by the lines of the Penn Central Railroad Company, on the easterly side by privately owned commercially developed property, and

on the southerly side by a stream known as Maiden Choice Run which separates it from a public street of the City of Baltimore, Primson Avenue. The second parcel zoned Residential lies southerly of Maiden Choice Run and has frontage on Primson Avenue. At one time there was a bridge connecting Primson Avenue across the Run which gave access to the commercial property. The bridge fell into disrepair some years ago, was closed and barricaded by the City of Baltimore, and the City has refused to repair or rebuild the bridge on the land owned by it.

Petitioner applied to the City of Baltimore to have it rebuild the bridge, which application was refused. Petitioner then applied to the appropriate department of the City for permission to construct an access road on its residentially classified property adjacent to the former bridge and to build a new bridge on its own property so as to provide a connection to the public street, Primson Avenue.

At the time of the hearing before the Board of Municipal and Zoning Appeals of Baltimore City (the Board), the application of the Petitioner was protested by residents on nearby streets, including one resident whose home was on Primson Avenue. Primson Avenue is a two block street at this point, running northerly from Wilkens Avenue, one of the main arteries of the City of Baltimore. The protestants' objections were based upon the fact that a commercial development of the Petitioner's property would require a certain amount of commercial traffic which would cross Primson Avenue between Wilkens Avenue and the Petitioner's property. There was no testimony that commercial traffic on the proposed driveway itself would have any detrimental effect upon adjacent property. The testimony as well as the opinion of the Board shows that the commercial use of Petitioner's property is a legal use in accordance with the zoning law of the City of Baltimore and

that, unless the permit were granted, Petitioner would have no access and hence no utility.

The precise issue is shown in the following comments by two members of the Board:

> "(The Chairman) One of the problems we have, you are confiscating the use of this property, unless it's for residential purposes" (E. 25).[1]
>
> "(Mr. Cuccia) The only point that I am trying to consider is this, what will anybody do that owns that property? It is against the railroad, you cannot use it for homes" (E. 24).

The chairman referred to the old bridge as follows:

> "(The Chairman) Mrs. Summers, if that bridge existed today, you would not have a standing before this Board to object to the use of this heavy equipment going to his commercial property.
>
> "(Mr. Cuccia) This is also a big piece of property, and if he sits on it, he does not get anything out of it, because of the fact the man owns it and cannot utilize it" (E. 28).

The Board in its findings of fact (E. 38) said:

> "The testimony shows that the only access to Lot 21 and Lot 10, shown on the plat filed with the Board, is on Primson Avenue. It was also testified that a City bridge had been removed and without access the property cannot be used in conjunction with a proposed construction office and warehouse on the commercially zoned property" (13a).

The Board then commented that the testimony showed the operation of the business on the commercial property would necessitate truck travel on Primson Avenue and that the increased traffic would adversely affect the area. The Board then concluded that no sufficient reason was shown to make an exception to the use regulations (relying on

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[1] Reference is to printed Extract filed as part of the Record.

Sections 10 and 11 of the zoning ordinance) and disapproved the application.

The Baltimore City Court (Sodaro, J.) in its opinion summarized the pertinent facts as follows:

> "The testimony further showed that *the only egress to Lot 10 and Lot 21, as shown on the plat, is on Primson Avenue; that a City bridge had been removed and without access the property cannot be used in conjunction with the proposed construction office and warehouse on the commercially zoned property;* that the operation of this business would necessitate anywhere from two to ten trucks daily entering this area and the trucks would be of the tractor-trailer type; that the Appellant is exercising an option to purchase both pieces of property for $38,000.00." (Emphasis added.)

In spite of this factual analysis, the Baltimore City Court found that the action of the Board was not "arbitrary, unreasonable and capricious resulting in a denial of due process of law, . . .".

The question was further raised in the Court of Appeals of Maryland where it was stated in the brief of Appellant as follows:

> "Does the action of the Board permanently restrict the enjoyment of the property of the applicant to such an extent that it cannot be utilized for any reasonable purpose and constitute a taking of the applicant's property without due process?"

Appellant's brief, in support of its argument on this question, cited among other authorities the rule as stated in Yokley, *Zoning Law and Practice* (3rd Ed., 1965), Section 2-12:

> "A classification permanently restricting the enjoyment of property to such an extent that it cannot be utilized for any reasonable purpose goes beyond valid

regulations and constitutes a taking without due process."

The Court of Appeals of Maryland noted this argument and dismissed it in the following fashion:

> ". . . Of course, Litty (President of Petitioner corporation) insists the denial of his application is tantamount to confiscation, but we do not see it quite that way. *It is clear, we think, that Litty's legal access to Lots 10 and 21 is by way of Primson Avenue. That he can't drive a motor vehicle onto the property is quite beside the point. Access can be accomplished on foot or on horseback, materials can be fetched by pack-train.* A bridge would be far more convenient, of course, and, in the long run, much less expensive. But this is none of our concern and what is somewhat more to the point, Litty knew the circumstances when he exercised his options and committed his company to the purchase of Lots 10 and 21." (Emphasis added.)

The constitutional issue here involved, as shown by the proceedings, was raised (1) at the time of the hearing before the Board; (2) at the time of the hearing before the Baltimore City Court, and (3) in the Court of Appeals of Maryland. It has not been answered. The facts are established and stated in the opinions of the administrative body and the two courts. The property owner is deprived of all access and thereby of all utility of his property by this action by the City of Baltimore.

ARGUMENT

I.

ZONING LEGISLATION IS AN EXERCISE OF THE POLICE POWER OF THE STATE AND IS SUBJECT TO THE LIMITATIONS APPLICABLE TO SUCH POWER.

A. *This is an original question in this Court.*

The Court of Appeals of Maryland cited no authority for its decision that the Petitioner had not been deprived of

its property without due process by the action of the City of Baltimore whereby all access to and, therefore, all use of the property was prevented.

No decision of the Supreme Court of the United States nor any decision of the United States Courts of Appeal nor any decision of the highest Court of Appeals of any of the fifty States has been found which permits a State under the exercise of the zoning power or any other aspect of the police power to deprive a property owner of all use of his property without compensation.

Every decision which counsel has been able to locate in which a state or a municipality acting under the delegated state police power has attempted to deny all access to property has held such action would be invalid except upon the payment of compensation. In each case in which the question has been raised and considered the court has concluded that, if the local legislation were construed to prevent all access, it would be in violation of constitutional protections and has construed the State law so as to avoid the confrontation with constitutional principles.

B. *Basic decisions of the Maryland Court and the Supreme Court limit the zoning power under the police power.*

Zoning law was first upheld in the State of Maryland in a decision rendered in 1926 in *Tighe v. Osborne*, 150 Md. 452, 113 A. 465 (1926). In that same year this Court handed down its decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016. In that case this Court considered the argument that the *restriction* upon use of the property whereby its value was *diminished* substantially amounted to an unconstitutional action. It was concluded:

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of

those restrictions which we have indicated as pertinent to the inquiry, at least [illegible] reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare" (272 U.S. 395).

This Court held in *Nectow v. City of Cambridge*, 277 U.S. 183, 72 L. Ed. 842, that the zoning law there involved, when applied to the particular property in question, was in violation of the Fourteenth Amendment to the Constitution of the United States.

Mr. Justice Sutherland, speaking for the Court, said:

"The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare" (277 U.S. 188).

II.

MARYLAND CONSTITUTIONAL PROVISIONS ARE CO-EXTENSIVE WITH FEDERAL CONSTITUTIONAL PROVISIONS.

It has been held on numerous occasions by the Court of Appeals of Maryland that the phrase "the law of the land" as used in Article 23 of the Declaration of Rights of the Maryland Constitution has the same meaning as the phrase "due process of law" in the Constitution of the United States. *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 270, 101 A. 710 (1917). We are, therefore, not dealing with any conflicting interpretations of the Constitution of the State of Maryland and the due process clause of the Constitution of the United States. The Maryland Court has said that the decisions of this Court are "practically direct authorities

for the purpose of construing this article of the Maryland Declaration of Rights." *Home Utilities Co., Inc. v. Revere Copper and Brass, Inc.*, 209 Md. 610, 122 A. 2d 109 (1956).

III.

A DENIAL OF ALL ACCESS IS A DENIAL OF ALL USE AND IS A TAKING OF PROPERTY.

The highest Courts of all States in which the question has been raised have held that the denial of *all* access was not justified under the zoning law. A number of cases are collected in Rathkopf, *Law of Zoning and Planning*, Section 13-12, where it is concluded:

> "If, in any such situation, the result of the ordinance is that a portion of the owner's land is rendered useless for any conforming purpose the ordinance would be unconstitutional as confiscatory and subject to invalidation by the courts on that ground."

The same conclusion is stated in Yokley, *Zoning Law and Practice* (3rd Ed., 1965), Section 2-12:

> "A classification permanently restricting the enjoyment of property to such an extent that it cannot be utilized for any reasonable purpose goes beyond valid regulations and constitutes a taking without due process."

Yokley cites, among other cases, *Congressional School of Aeronautics v. State Roads Commission*, 218 Md. 236, 146 A. 2d 558, and *England v. Mayor and Council of Rockville*, 230 Md. 43, 185 A. 2d 378.

This principle was applied in both of these cases by the Maryland Court to declare zoning restrictions which prevented all use of a particular property a taking of such property and, therefore, invalid. See also *Frankel v. Mayor and City Council of Baltimore*, 223 Md. 97, 162 A. 2d 447

(1959), and *Baltimore v. Cohn*, 204 Md. 523, 105 A. 2d 482 (1954).

The right of access and the deprival of such right have been the subject of two annotations in A.L.R., 63 A.L.R. 2d, Sections 1441 and 1443, and 43 A.L.R. 2d 1072, Section 6.

None of the cases cited by Yokley, *supra*, Rathkopf, *supra*, nor any cited in A.L.R. held valid the denial of the right to use residential property for access to commercial property when there was no other available access to the property. The decision in this case by the Maryland Court of Appeals is the first such decision.

The Rhode Island court held valid a zoning ordinance which did not permit a *secondary* means of access through residential property, but, when faced with the question of denial of all access in *Newman v. Mayor of City of Newport*, 57 A. 2d 173 (R.I., 1948), it held:

> "The right of ingress and egress from the highway to one's land is not a mere privilege; it is a property right appurtenant to the land. Subject to reasonable regulation in the public interests, such a right can not be taken away or materially impaired even under statutory authority, without just compensation" (57 A. 2d 177).

The Washington court construed one of its zoning laws to permit access, but noted that to rule otherwise would raise serious constitutional questions. *Hauser v. Arness*, 47 Wash. 2d 358, 267 P. 2d 691 (1954).

The New Hampshire court made a similar ruling in *Faulkner v. Keene*, 85 N.H. 147, 155 A. 195 (1931).

The New Jersey court, in making a similar ruling, based its decision in part upon the fact that the industrial use of the landlocked property was a legal use and that con-

tinued industrial use would be impossible without access to the street and therefore the denial of permission for the plaintiff to use his own land for a right of way would amount to confiscation. *Home Fuel Oil Co. v. Board of Adjustment*, 5 N.J. Super. 63, 68 A. 2d 412 (1949).

In *Appeal of Rolling Green Golf Club*, 97 A. 2d 523 (Pa., 1953) the Pennsylvania court, when it upheld the right of a property owner to build an access road over residential property to connect to commercial property owned by the applicant, placed its decision squarely on the constitutional issue, saying:

> *"The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody is a natural right.* It does not owe its origin to constitutions. It existed before them. *It is a part of the citizen's natural liberty* — an expression of his freedom — *guaranteed as inviolate by every American Bill of Rights."* (Emphasis the Court's.) (97 A. 2d 525).
>
> "The right of a property owner to have (or build) a road over his own land to connect with a public road has been recognized for centuries as use of his fundamental inalienable rights. The right of ingress and egress has always been considered such an important right that the law from very early times even gave a neighbor a way of necessity over the property of another. See 2 *Blackstone's Commentaries* 35". (Other citations omitted.) (97 A. 2d 526).

A 1938 New York case, often cited as a "landmark" decision, contains *dicta* that an owner might be temporarily compelled to bear a burden without compensation. The case is *Arvene Realty v. Thatcher*, 278 N.Y. 222, 15 N.E. 2d 587 (1938):

> ". . . an ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose or which deprives the owner of the bene-

ficial use of his property goes beyond the bounds of recognition and must be recognized as a taking. . . . [T]he situation might be different where it appears that within a reasonable time that property can be put to a profitable use. The temporary inconvenience or even hardship of holding unproductive property might then be compensated by ultimate benefit to the owner or, perhaps, even without such compensation the individual owner might be compelled to bear a temporary burden in order to promote the public good."

* * *.

"The only substantial difference in such case between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation while outright confiscation would relieve him of that burden" (15 N.E. 2d 592).

IV.

THE REQUIREMENT THAT PRIVATE PROPERTY BE DEVOTED TO PUBLIC PURPOSE TO MEET THE GENERAL NEEDS OF THE PUBLIC WITHOUT COMPENSATION IS UNCONSTITUTIONAL.

There is a recently established practice in modern zoning laws to require a developer as a condition of his development to provide parks, open spaces and other amenities, but this power has been restricted and not extended when the need for the parks resulted from activity on other land than that of the owner. Rathkopf, *supra*, Chapter 6, after noting that restrictions on use may be imposed in order to prevent the owner from imposing a cost on others, concludes:

". . . but when the State restricts his property rights in order to obtain a public benefit it must compensate him" (Section 6-8).

"It is unconstitutional to compel an owner to commit his land for park use in order to meet the public desire for a park, but an owner may be compelled to furnish a portion of his land for a park where the need

for a park results primarily from activity on other land of the owner" (Section 6-8).

Rathkopf, *supra*, 1969 cumulative supplement, Section 6-12, cites *Ambler Realty Co. v. Euclid, supra*, for authority that "There can be no conception of property aside from its control and use and upon its use depends its value."

The Court of Appeals of Maryland (5a) comments upon:

". . . the desire of the residents to preserve the insularity of their little quarter. To be able to thwart any use of Lots 10, 21 and P inures to their benefit, providing them, in effect, with a park or a playground at no expense to them or to the City."

The Court then stated that Litty was entitled to enjoy the use for which the land is zoned and suggests negotiations be undertaken to provide for the rebuilding of the bridge — ignoring the refusal of the City to rebuild the bridge before this proceeding was instituted and the repetition of that refusal by the City Solicitor in oral argument before the Court.

V.

WHEN THE STATE EXERCISES ITS POWER OF EMINENT DOMAIN THE RIGHT OF ACCESS IS A VALUABLE PROPERTY RIGHT ENTITLED TO COMPENSATION.

This Court established the basic rules for compensation of a property owner when his property was taken by exercise of the power of eminent domain in *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 338.

The modern practice of limited access highways has resulted in the establishment of certain principles with reference to the requirement of the payment of just compensation for the taking of a right of access.

This requirement of compensation has been recognized in Maryland when a property owner is denied access to an existing road. *D'Arago v. State Roads Commission*, 228 Md. 490, 180 A. 2d 488 (1962).

Such right of access as a property right is discussed in 3 Nichols, *Eminent Domain* (3rd Ed., 1962). See also 43 A.L.R. 2d 1072, and 4 Md. L. Rev. 219.

The conclusion of all of the cases is that the power of eminent domain includes the power to take a right of access, but that such a right cannot be taken without just compensation. The rule is extended in Nichols, *supra*, Section 6.32(a):

> "Accordingly if there is only one means of access from the parcel of land over other private property to the public ways and that means is destroyed by the taking of the land over which the owner had a right to pass, whether such land belonged to him or others, his land thereby cut off is taken and he is entitled to compensation." *United States v. Grizzard*, 219 U.S. 180, 55 L. Ed. 165, 31 S. Ct. 162.

VI.

THE ZONING POWER MAY NOT BE USED TO PACIFY PROTESTING NEIGHBORS WITHOUT OTHER JUSTIFICATION RELATED TO THE PUBLIC HEALTH, SAFETY, MORALS OR WELFARE.

The protestants in this case are residents of a small island of residential property located in a predominantly industrial and commercial area. The Petitioner's property to which he seeks access is surrounded on three sides by industrial uses, including the line of the Penn Central Railroad. It is obvious that the administrative agency was influenced by such protest in spite of the fact that the Maryland Court of Appeals has said that zoning "is not to be determined by a plebiscite of the neighborhood." *Benner v. Tribbitt*, 190 Md. 6, 20, 57 A. 2d 346 (1948). This principle is recognized in I Rathkopf, *supra*, 1969 Supple-

ment, Section 6-6i, where he cites and quotes from *De Sena v. Gulde*, App. Div. N.Y. 1965:

> "Moreover we think that constitutional limitations prevented the adoption of an amendment. In our opinion, the balance between the state and the individual was not properly maintained by imposing the burden of economic disadvantage on the respondent *to pacify the anger of the Protestants* and to avoid financial loss to the community. In this sense, the amendment was discriminatory and violated the equal protection of the laws to which the respondent was entitled by thrusting a special hardship upon him."

VII.

THE FAILURE OF THE CITY TO ACT COMBINED WITH ITS REFUSAL TO PERMIT PETITIONER TO ACT AMOUNTS TO CONFISCATION.

The Petitioner first sought to have the City rebuild the bridge on its property which at one time provided access to the six acres of commercially zoned property owned by him. The City refused to do so. The Petitioner owned adjacent property which had access to the public street, Primson Avenue, and applied for permission to provide his own access over his own property to the commercial parcel owned by him. The City in this proceeding refused such permission.

It is the combination of these two arbitrary, unreasonable and illegal actions by the City which has deprived the Petitioner of all use of his property.

Petitioner, even in its Motion for Reargument, suggested that the decision of the Court of Appeals of Maryland might be justified if, but only if, the City would retract its position and agree to rebuild the public bridge.

Petitioner was caught in the horns of a dilemma in determining which avenue of litigation to pursue. It is estab-

lished that, when a public street provides the *only* access and such street falls into disrepair and is blocked by the failure of the public authority to carry out its duty, the property owner is entitled to damages for destruction of a valuable property right. *Bemble v. Anne Arundel County*, 94 Md. 321, 51 A. 179 (1902); *Johnson v. Oakland*, 148 Md. 432, 129 A. 648 (1925); *DeLauder v. County Commissioners of Baltimore County*, 94 Md. 1, 50 A. 427 (1901); *Mayor and City Council of Baltimore v. Dobler*, 140 Md. 634, 118 A. 168 (1922); 4 Md. L. Rev. 219.

In *Sanderson v. Baltimore*, 135 Md. 509, 523, 109 A. 425, 430 (1920), involving the destruction of all access, the Court held, "The injury amounts to or is equivalent to the taking of property without making just compensation therefor to the owner."

However, the bridge, now blocked and impassable, was not the only access because Petitioner owns adjacent land, fronting on a public street, and Petitioner applied for permission to construct a road on this property to provide at his expense access which would connect his commercial property to the public street.

In *Walters v. B. & O. R.R.*, 120 Md. 644, 656, 88 A. 47, 52 (1913), the Court recognized the rule whereby the destruction of all access was a taking, but distinguished such cases because the property in question had frontage on two streets and said:

> "An abutting owner cannot be deprived of the street affording him access to his premises unless there is left for his use and enjoyment other suitable means of access or just compensation is paid him for the destruction of the same."

The interference with access as distinguished from the destruction of all access has been held non-compensable

and not a taking of property by this Court in *Sauer v. New York*, 206 U.S. 536, 51 L. Ed. 1176, 27 S. Ct. 686 (1907). This Court concluded that the decision of the New York court concerning the nature of the abutter's rights was conclusive. In that case there was only a restriction on access and not a destruction of all access.

The refusal of the City to rebuild the bridge and its refusal to permit Petitioner to build his own has effectively prevented all access unless this Court grants certiorari to correct an abusive exercise of the police power in violation of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

The decision of the Court of Appeals of Maryland is in conflict with the applicable decisions of this Court on an important right guaranteed by the Federal Constitution. Such decision is in conflict with the application of constitutional principles by this Court and by the highest courts of appeal in all of the States of the United States. If this Court does not grant certiorari, the decision of the Court of Appeals of Maryland will establish for the first time the principle that the police power of a state may be used to destroy all use of a property and thereby take the property without compensation.

Respectfully submitted,

CHARLES C. W. ATWATER,
MYLANDER & ATWATER,
Counsel for Petitioner.

APPENDIX

OPINION OF COURT OF APPEALS OF MARYLAND

No. 271, September Term, 1969

Leimbach Construction Company

v.

Mayor and City Council of Baltimore et al.

Hammond, C. J.; McWilliams, Singley, Smith and Digges, JJ.

Opinion by McWilliams, J.

Filed: April 13, 1970

The boundaries of the triangular enclave within which lies the land of the appellant (Litty)[1] are Wilkens Avenue on the south, Caton Avenue on the east and the Pennsylvania Railroad on the northwest. On the opposite side of Wilkens Avenue are the spacious grounds of St. Agnes Hospital. On the other side of the railroad is Loudon Park Cemetery. Maiden Choice Run flows through the enclave, from west to east, continuing to its confluence with Gwynn's Falls, a half mile or so farther east. An occasional reference to the accompanying plat will facilitate comprehension of the facts.

Litty, a general contractor, has outgrown his present place of business. Sometime prior to March 1969 he ac-

[1] Ernest J. Litty, the president and apparently the principal owner of the appellant, Leimbach Construction Company.

quired an option to purchase the three acres of commercially zoned property designated Lot 10 and Lot 21 on the plat. Although legal access thereto is provided by Primson Avenue, vehicular access is, in fact, impossible because the bridge over Maiden Choice Run fell down fifteen, "maybe even forty" years ago. It seems that city officials displayed a massive indifference to Litty's suggestion that the bridge be rebuilt inspired, no doubt, by an estimated cost of $50,000 to $55,000. There were vague mutterings about splitting the cost but Litty had a notion that a crossing could be accomplished at a point about 100 feet southwest of Primson Avenue for about $12,000. He thereupon obtained an option to buy the irregularly shaped one acre of residentially zoned land designated P on the plat. He had in mind building a 30 foot driveway from Primson Avenue across the easternmost panhandle thereof and thence over a bridge to Lots 10 and 21.

On 19 March 1969 Litty applied for a permit to "install [a] driveway and culvert across [the] corner of [the residential] lot." The application was disapproved by the zoning commissioner "for the reason that it violates [Section 11 of] the zoning ordinance." The Board of Municipal and Zoning Appeals took up Litty's appeal on 15 April. Bettie Owings Summers, the chairman of the St. Agnes Neighborhood Association, testified that of the 127 householders in the community at least 113 opposed Litty's application. She spoke, with obvious relish, of the defeat of an earlier (1960) attempt to rezone Lot P from residential to commercial. She expressed fears that Litty's tractor-trailer trucks, two to ten daily, would create a traffic hazard and be an "additional nuisance." Litty testified that he proposed to spend $300,000 to $400,000 improving Lots 10 and 21. Some mention was made of pedestrian access to the cemetery through a tunnel under the railroad which it seems is on a 30 foot fill. Lots 10 and 21 were described as a "mess," a "jungle" and a "wilderness."

The Board found that the "testimony shows that the only access to Lot[s] 21 and 10 * * * is on Primson Avenue." It noted that "the operation of the [proposed] business would necessitate anywhere from two to ten trucks

daily entering the area and that these trucks would be of the tractor-trailer type." It noted also that the opposition of the St. Agnes Neighborhood Association was based on a claim that the proposed use "would be an encroachment to the residential character of the neighborhood." The Board's resolution, dated 18 April, goes on to say:

> "The premises is vacant land on which it is proposed to construct a 30 foot driveway and metal culvert for ingress and egress to the adjoining commercial lot.
>
> "Under the provisions of Sections 10 and 11 of the Zoning Ordinance, a business and a yard for the storage of motor vehicles are uses excluded from the Residential Use District. The proposal in this case is to construct a driveway and culvert and use that portion of the lot for ingress and egress to the commercially zoned property."
>
> * * * * * *
>
> "The Board is of the opinion that no sufficient reason was shown to make an exception to the use regulations as proposed in this appeal. The Board also finds that the proposal would be detrimental to the health, safety and welfare of the community.
>
> "In accordance with the above facts and findings, the Board disapproves the application."

Litty's appeal from the decision of the Board came on for a hearing, before Sodaro J., in the Baltimore City Court, on 11 June. Miss Summers testified there was a time when there were a few houses on Lot 21 access to which was by "a foot bridge across Maiden Choice Run * * * [which was] never wide enough for any vehicle to go across." Litty's testimony before Judge Sodaro was brief. He said, as he did at the hearing before the Board, that there was no access to the property. His revelation that he had exercised the options to purchase Lots 10, 21 and P in May, *after* the decision of the Board, was something of a surprise to the court and counsel and it is not, to be

sure, without significance. The consideration for Lots 10 and 21 was said to be $26,000; for Lot P, $12,000.

In affirming the action of the Board, Judge Sodaro said:

> "The court is of the opinion that the proposed driveway would be a commercial use of residentially-zoned land in violation of the Zoning Ordinance. The Appellant contends that Sections 10 and 11 of the Zoning Ordinance do not expressly prohibit the use of the driveway as an access route to the commercial lot; that the Ordinance should be strictly construed and should not be applied to interfere with the beneficial use of the property in question unless the restriction appears on the fact of the Ordinance or by clearly implication. This contention is without merit. The language of the pertinent sections of the Ordinance provides that only the uses prescribed in the Ordinance may be made of land in each zone classification. There is really nothing left for interpretation. * * *."

I.

Section 11 of the zoning ordinance, Baltimore City Code, Art. 30 (1966), is as follows:

> "In a Residential Use District, no use of land or building shall be excluded, except that
>
> (a) no land or building shall be used; [for]
>
> * * * * * *
>
> (1) Uses excluded from Residential and Office Use Districts [Section 10]
>
> (2) Business offices
>
> (3) Professional offices, except as provided in Section 12."

Section 10 prohibits the use of land in a residential district for "business" and for "storage yards for building or structural materials or equipment."

As Litty concedes, we seem never to have considered the precise question here presented; nor, we are told, have

the courts of our sister states. Both Litty and the appellee (the City) have cited a number of cases but they all seem to deal either with different kinds of ordinances or else the properties in question were without access requiring consideration of the question whether the enforcement of the ordinance would be confiscatory. Of course, Litty insists the denial of his application is tantamount to confiscation but we do not see it quite that way. It is clear, we think, that Litty's legal access to Lots 10 and 21 is by way of Primson Avenue. That he can't drive a motor vehicle onto the property is quite beside the point. Access can be accomplished on foot or on horseback; materials can be fetched by pack-train. A bridge would be far more convenient, of course, and, in the long run, much less expensive. But this is none of our concern and, what is somewhat more to the point, Litty knew the circumstances when he exercised his options and committed his company to the purchase of Lots 10 and 21.

The question then is not whether the action of the Board amounts to confiscation but simply whether the proposed use of Lot P is prohibited by the Ordinance. We agree with Judge Sodaro that the use Litty proposes to make of the driveway shown in the plat would be a "business" use of land in a residential use district.

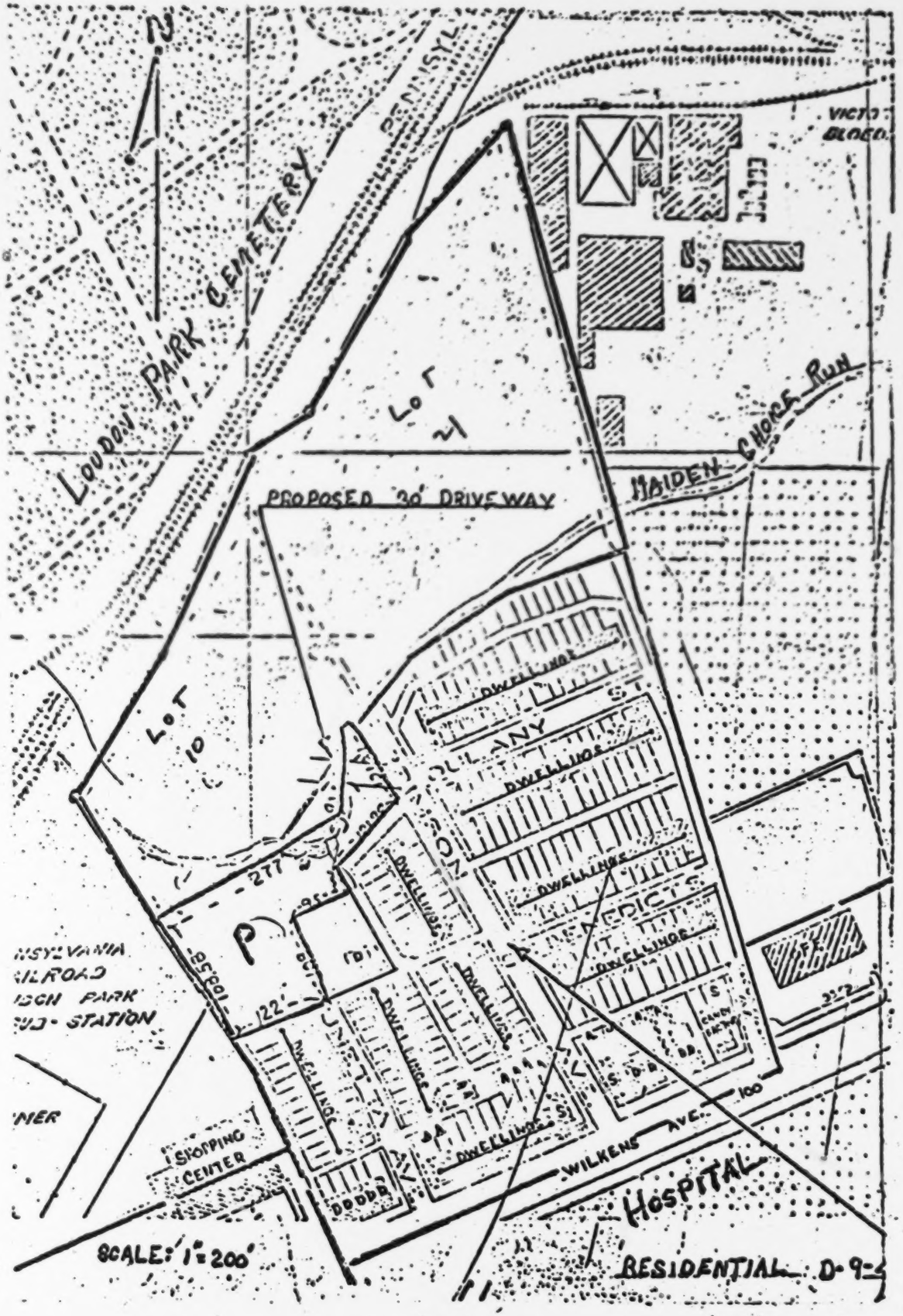
II.

There is about this case a faint bouquet suggesting that Litty may be the victim of a little hanky-panky. We can understand the desire of the residents to preserve the insularity of their little quarter. To be able to thwart any use of Lots 10, 21 and P inures to their benefit, providing them, in effect, with a park or a playground at no expense to them or to the City. And in this, thus far at least, they have been successful. The City, on the other hand, having created value in the land by classifying it for commercial use, derives tax revenues from it without having to provide much, if anything, in the way of service. But Litty is entitled to enjoy any of the uses for which the land has been zoned and if his proposed use is neither prohibited

nor unreasonable he ought not to be frustrated by a dog in the manger attitude on the part of the City and the neighborhood in respect of the bridge and the passage of a few trucks each day over Primson Avenue. As we see it there is no reason why Litty and the City should not be able to arrive at a a mutually satisfactory arrangement in respect of the bridge provided negotiations looking to such an arrangement are undertaken in the utmost good faith. All concerned should understand that any litigation which may develop in the future will be subject to careful scrutiny by the courts to see if there is any lack of good faith.

Affirmed.

Costs to be paid by Appellant.


LOUDON PARK CEMETERY
PROPOSED 30' DRIVEWAY
HAIDEN CHURCH RUN
LOT 21
LOT 10
DWELLINGS
WILKENS AVE.
HOSPITAL
SHOPPING CENTER
SCALE: 1" = 200'
RESIDENTIAL D-9

BALTIMORE CITY COURT MEMORANDUM OPINION

(Filed June 19, 1969)

This is an appeal from a Resolution of the Board of Municipal and Zoning Appeals of Baltimore City, denying a permit to construct a driveway and metal culvert for ingress and egress to the adjoining commercial lot at the west side of Primson Avenue, 509′ 1″ north of Wilkens Avenue, in a residential use District, 40 foot height district, D-9 area District.

The Board disapproved the application because it found insufficient reason to make an exception to the use regulations as proposed in this appeal. The Board also found the proposal to be detrimental to the health, safety and welfare of the community.

Under the provisions of Sections 10 and 11 of the Zoning Ordinance a business and a yard for the storage of motor vehicles are excluded from the Residential Use District.

The record and the transcript of the testimony indicated that on March 13, 1969 the Department of Transit and Traffic submitted the following report:

> "Even though the particular property referred to is zoned commercial, we feel that the proposal to close Primson Avenue and construct a connecting bridge from the planned industrial facility to Primson Avenue, would induce an influx of commercial traffic into this predominantly residential neighborhood. This, we believe, would have a deleterious effect on the neighborhood."

The testimony further showed that the only egress to lot 10 and lot 21, as shown on the plat, is on Primson Avenue; that a City bridge had been removed and without access the property cannot be used in conjunction with the proposed construction office and warehouse on the commercially zoned property; that the operation of this business would necessitate anywhere from two to ten trucks daily entering this area and these trucks would be of the tractor-

trailer type; that the Appellant is exercising an option to purchase both pieces of property for $38,000.00.

Testimony was offered by several neighbors, some representing the Saint Agnes Neighborhood Association, indicating their opposition because it would be an encroachment to the residential character of the neighborhood.

The record also reveals that in 1960 Ordinance Nos. 278 and 444 were introduced into the City Council of Baltimore to rezone the property adjacent to this same lot from residential to commercial for the purpose of building a warehouse and these proposals to rezone the property were defeated. Testimony of protestants also indicated their opposition to this plan as being dangerous to the residentially zoned area and that it would have a disturbing and undersirable effect in the neighborhood — that the increased traffic also would adversely affect the area.

At the hearing in this Court, Bettie Owens Summers, President of St. Agnes Neighborhood Association, and Ernest J. Litty, President of the Appellant construction company, testified to their respective positions as they did at the hearing before the Board.

In this proceeding the Court must be mindful that the scope of judicial review is limited. The Court of Appeals in its most recent pronouncement in the case of Eger v. Stone (Daily Record, June 10, 1969) held that where sufficient evidence is introduced before the Board to make the matter before it "fairly debatable," its decision denying an application, such as in the instant case, would not be arbitrary and capricious, and it could not be successfully challenged in court. The Appellate Court said further:

> "We have made it quite clear that if the issue before the administrative body is 'fairly debatable,' that is, that its determination involved testimony from which a reasonable man could come to different conclusions, the Courts will not substitute their judgment for that of the administrative body, in the absence of an unconstitutional taking of private property for public

use without the payment of just compensation. This rule will be adhered to even if we are of the opinion that the administrative body came to a conclusion we probably would not have reached on the evidence.

In the instant case, but for the rule, we might well have reached the conclusion reached by the learned lower court, but in enforcing the rule we are obliged to say that reasonable persons could have reached a different conclusion on the evidence so that the issues were fairly debatable, and hence the decision of the Board must be sustained."

The narrow issue here relates only to the construction and subsequent use of a driveway for ingress and egress over residentially zoned land to the adjoining commercial lot.

The Court is of the opinion that the proposed driveway would be a commercial use of residentially-zoned land in violation of the Zoning Ordinance. The Appellant contends that Sections 10 and 11 of the Zoning Ordinance do not expressly prohibit the use of the driveway as an access route to the commercial lot; that the Ordinance should be strictly construed and should not be applied to interfere with the beneficial use of the property in question unless the restriction appears on the face of the Ordinance or by clear implication. This contention is without merit. The language of the pertinent sections of the Ordinance provides that only the uses prescribed in the Ordinance may be made of land in each zone classification. There is really nothing left for interpretation. See City of Providence v. First National Stores, Inc., 210 Atl. 2d 656 (R.I. 1965), where the facts are quite similar to the instant case; and Wolf v. Zoning Board, 192 Atl. 2d 305 (N.J. 1963).

Accordingly, the Court finds that the Board's legal construction of the pertinent Sections of the Zoning Ordinance was correct. Moreover, the appellant having acquired the subject property on an option basis, no hardship has been demonstrated. In any event, whatever hardship may exist as a result of the zoning restriction when applied to this property is not so unreasonable as to constitute an

arbitrary or capricious interference with the basic right of private ownership. It is axiomatic that the individual right to use privately owned property is subordinate to the paramount right of the public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, provided, however, that such zonal restriction is itself lawful and not such as to permanently deprive the property owner of all reasonable use of his property. Mere financial hardship or an opportunity to get an increased return from the property does not justify giving the pertinent sections of the zoning ordinance a strained interpretation as to permit the appellant to construct this driveway. Marino v. City of Baltimore, 215 Md. 206 (1957).

The question whether to grant or deny this permit under the testimony in this case was fairly debatable. This Court cannot substitute its judgment for that of the Board. It was based on substantial evidence that the proposal would be detrimental to the health, safety and welfare of the community, and that it would have a disturbing and undesirable effect in the neighborhood.

Consequently, the appellant having failed to meet its burden of demonstrating that the Board's resolution was not based on substantial evidence and that it was illegal, arbitrary, unreasonable and capricious resulting in a denial of due process of law, the decision of the Board is hereby affirmed.

ANSELM SODARO,

Judge.

RESOLUTION OF BOARD OF MUNICIPAL AND ZONING APPEALS

April 18, 1968

At a meeting of the Board of Municipal and Zoning Appeals on Tuesday, April 15, 1969, the following resolution was passed:

"Resolved, that in the matter of Appeal No. 123-69, Leimbach Construction Corporation, 3906 Hickory Ave-

nue, Appellant, to permit the construction of a driveway and metal culvert for ingress and egress to the adjoining commercial lot at the west side of Primson Avenue, 509'1" north of Wilkens Avenue, the Board of Municipal and Zoning Appeals, after giving public notice, inspecting the premises, holding a public hearing, considering all data submitted, and by authority of Ordinance No. 711, approved May 21, 1953, known as the Zoning Ordinance, made a study of the premises and finds that the property is on the west side of Primson Avenue, 509 feet 1 inch north of Wilkens Avenue, in a Residential Use District, 40-foot Height District, D-9 Area District.

"The premises is vacant land on which it is proposed to construct a 30 foot driveway and metal culvert for ingress and egress to the adjoining commercial lot.

"Under the provisions of Sections 10 and 11 of the Zoning Ordinance, a business and a yard for the storage of motor vehicles are uses excluded from the Residential Use District. The proposal in this case is to construct a driveway and culvert and use that portion of the lot for ingress and egress to the commercially zoned property.

"The testimony shows that the only access to Lot 21 and Lot 10, shown on the plat filed with the Board, is on Primson Avenue. It was also testified that a City bridge has been removed and without access the property cannot be used in conjunction with a proposed construction office and warehouse on the commercially zoned property. The testimony further shows that the operation of this business would necessitate anywhere from two to ten trucks daily entering this area and these trucks would be of the tractor-trailer type. The purchase price for both pieces of property was $38,000.

"On the other hand there was testimony offered by several neighbors, some representing the St. Agnes Neighborhood Association, stating their opposition to this appeal because it would be an encroachment to the residential character of the neighborhood. The testimony also indicated that in 1960, Ordinance Nos. 278 and 444 were intro-

duced into the City Council of Baltimore to rezone the property adjacent to this same lot from Residential to Commercial for the purpose of building a warehouse and these proposals to rezone the property were defeated. The protestants also indicated that they are opposed to this plan as being dangerous to the residentially zoned area and that it would have a disturbing and undesirable effect in the neighborhood. The increased traffic also would adversely affect the area.

"The Board is of the opinion that no sufficient reason was shown to make an exception to the use regulations as proposed in this appeal. The Board also finds that the proposal would be detrimental to the health, safety and welfare of the community.

"In accordance with the above facts and findings, the Board disapproves the application."

GILBERT V. RUBIN,

Executive Secretary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 604

LEIMBACH CONSTRUCTION COMPANY,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
A MUNICIPAL CORPORATION, AND
BETTIE O. SUMMERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals of Maryland is fully set out on pages la through 6a of the Appendix to the Petition of Writ of Certiorari (hereinafter referred to as "A") and is reported in 257 Md. 635, 264 A. 2d 109 (1970).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on April 13, 1970. The Respondents deny that 28 U.S.C., Section 1257, provides jurisdiction for consideration of the instant Petition for Writ of Certiorari.

QUESTION PRESENTED

The Respondents accept the substance of the Petitioner's question but submit that it should be rephrased to delete unsupported conclusions, assumptions and characterizations, as follows:

Must the City rezone residential property to commercial merely to afford more convenient access to other property that is commercially zoned?

STATEMENT OF THE CASE

The Petitioner operates a construction business from its property in north Baltimore. In order to obtain a tract of ground on which to erect larger plant facilities for the housing and operation of its heavy duty equipment and large trucks, the Petitioner took options on two separate properties in southwest Baltimore near the St. Agnes Hospital. The one tract of land (Lots 10 and 21) contains about six acres irregular in shape. It is undeveloped and it has been zoned Commercial and was held for over 50 years by a development company. The other lot, across a stream, contains only an acre of ground, which is also irregular in shape, is zoned Residential (Lot "P").

The large commercial tract (Lots 10 and 21) is bound on the northwest by the railroad right-of-way, on both the southwest and the northeast by other commercial prop-

erties and the remaining side of the property is bound generally by the course of Maiden Choice Run (Plat, A. 7a). It will be noted, on the Petitioner's plat, that apparently Maiden Choice Run is wholly within the Petitioner's property line. The remaining land on the far side of the Petitioner's commercial property (to the southeast across Maiden Choice Run) is a residential development for almost a half dozen blocks to Wilkens Avenue which separates it from the hospital grounds to the south.

The Petitioner had acquired only options from the several owners on both the large commercial tract and the small residential lot (Lot "P") at the time it attempted to obtain a *rezoning* of Lot "P" from Residential to Commercial so that the Petitioner could use a portion of Lot "P" as a low cost roadway from Primson Avenue to Lot 10 of the commercial tract. It was the denial of this rezoning or "special exception" which precipitated the instant litigation.

ARGUMENT

THE CITY NEED NOT REZONE RESIDENTIAL PROPERTY TO COMMERCIAL MERELY TO AFFORD MORE CONVENIENT ACCESS TO OTHER PROPERTY THAT IS COMMERCIALLY ZONED.

The question presented to this Court is not a question of law but only a question of fact. That fact is whether the Petitioner has *any* access to its commercial tract on the northwest side of Maiden Choice Run which is generally the southeast boundary of the Petitioner's commercial tract and also the northwest terminus of Primson Avenue.

It is true that the Petitioner generally bantered the characterization "denial of access" in the hearings below, but at no point did it ever attempt to present any evidence that there was a denial of access. In fact at the time of the administrative hearing before the Board of Municipal and

Zoning Appeals, the Petitioner did not own the property but merely held an option to purchase. It was after the adverse result of that administrative hearing that the Petitioner exercised its option and subsequently received its Deed to the commercial tract. The conveyance was completed on August 27, 1969, which is over two months after the decision of the trial court on appeal from the administrative body. It was during this period of time, at the latest, when the Petitioner learned as a fact that its property extended to the center of the stream (Maiden Choice Run). It was probably because the Petitioner knew as a fact that it purchased and owned to the middle of the stream that it never attempted to present any evidence of title and was satisfied to continue to make the false assertion that the stream was wholly on City property.

The Court of Appeals of Maryland in its Opinion found *as a fact* that there was access to the Petitioner's large commercial lot (A. 5a). The Court of Appeals observed that the present physical condition of the southeast border of the Petitioner's large commercial tract may not presently permit truck ingress and egress from the paved portion of Primson Avenue across it to the southeast Maiden Choice Run boundary. The Court of Appeals noted that other types of access were now possible. This in itself is determinative of the question of denial of *all* access. There is not, in fact, denial of *all* access to the commercial tract (Lots 10 and 21). As a matter of actual fact, there is not even a denial of truck traffic access to and from this commercial tract to Primson Avenue if the Petitioner is willing to expend its own funds, rather than the taxpayers, to build the necessary bridge across Maiden Choice Run which is *partially* located on its property, notwithstanding the erroneous allegation to the contrary in its Petition (pages 3 and 6).

The Petitioner insists that the City must rezone or grant a "special exception" as to the residential Lot "P" to permit tractor-trailer and heavy construction equipment access to Lots 10 and 21 in the commercial tract, unless the City, at the expense of the taxpayers, is willing to construct a heavy duty bridge across Maiden Choice Run to extend Primson Avenue into the interior of the Petitioner's Lots 10 and 21. Since the Petitioner exercised its option and obtained conveyance of all three lots (from two different grantees) *after* the denial of the rezoning or "special exception" by the Board of Municipal and Zoning Appeals, there is no question of hardship involved. As a matter of fact even if the zoning of Lot "P" was changed to commercial, Petitioner would still be required to bridge Maiden Choice Run in order to gain vehicle access to Lots 10 and 21 from Lot "P".

The Petitioner never presented any evidence of title as to the stream, or remnants of the old wooden foot bridge which crossed it some 40 years ago, at the end of Primson Avenue. The burden of establishing ownership was on the Petitioner, as applicant, for a zoning change or "special exception". The record is devoid of the ownership, except as to such inference as may be drawn from the lines appearing on the plat reproduced both in the Petitioner's Appendix (A. 7a) and at the end of the Maryland Court of Appeals Opinion (257 Md. 635, 641). If this plat, upon which the Petitioner relies, is accurate, the stream is wholly within its property line and this is in direct contradiction to the allegations in the Petition (pages 3 and 6) that:

> ". . . the City has refused to repair or rebuild the bridge on the land *owned by it.*" (Emphasis supplied)

The Petitioner was responsible at the hearings and trials below to establish the ownership of the stream and of the

bridge, if it was to hold the City responsible for denying it all access to Primson Avenue which abuts perpendicularly to the southeast side of its property. It failed to meet this responsibility and burden. The only evidence before the administrative body, the trial court and the Court of Appeals of Maryland was the subject plat which would indicate that the stream is within the Petitioner's property and thus there would be no duty on the City to acquire an easement from the Petitioner to erect a bridge for the Petitioner's commercial benefit at the expense of the taxpayers. The estimated cost of such bridge was $30,000 to $35,000 (257 Md. 635, 635; A. 2a).

The Respondents were never aware that the vague reference to "denial of access" which the Petitioner used during the course of the litigation, with other legal stereotypes, was intended to mean that the City in fact owned the bed of the stream. The Petitioner never presented this factual assertion or any proof in support of it before the administrative body or the trial court. It was not even asserted in the Maryland Court of Appeals. The first time that the Respondents made this false assertion was in the Petitioner's Petition before this Honorable Court (pages 3 and 6). In the short period of time available to the Respondents to prepare this Brief, there was no opportunity to have a detailed title search and physical survey made of the area. The Respondents have acquired a copy of the Deed which the Petitioner received from its grantees of the large commercial tract on August 27, 1969 and that Deed is set out in full in the Appendix to this Brief. The Court's attention is invited to the metes and bounds description which appears in that Deed to the effect:

> ". . . and to the center of Maidens Choice Run; thence, running with and binding on the third line of the land described in said last mentioned deed as the same calls

> to bind on the center of Maidens Choice Run, the four following courses and distances, . . .; thence, still binding on or near the center of Maidens Choice Run and to and along the second line of the land described in said first mentioned deed, . . ."

It is apparent from the Deed, which has been in the possession of the Petitioner for over a year, that it has actual knowledge that the stream is not on the land of the City but in fact at least half on the Petitioner's own land. Here there is an express grant to the Petitioner to the center of the stream. The general rule is that a grant on a non-navigable stream conveys to the center of the stream. 93 C.J.S. "Waters" Section 84. Maryland law holds with this majority. *Linthicum v. Shipley*, 143 Md. 96, 99 (1922). This factual question should not have been raised as a mere allegation for the first time in the Supreme Court of the United States. Even if it were true, evidence of the ownership of the stream bed should have been introduced at the administrative hearing or at the latest in the trial court. The Petitioner conveniently ignored this procedure and was satisfied to merely assert that the City was unwilling to rebuild a bridge on its own land. For the information of this Honorable Court, the Respondents are including five pictures in the Appendix hereto.

First, a picture which was taken on October 27, 1932 and which shows the flimsy wooden pedestrian bridge that existed from Primson Avenue across Maiden Choice Run to the subject commercial tract. The City is without information as to who built this bridge or when. There is speculation that it was built by the previous owner of the commercial tract, which for a period of time had several residences on it. There was other speculation that the bridge may have been built by Baltimore County at some time prior to the City's annexation of the area in question. There

is no time to investigate and develop these fact which should be the burden of the Petitioner in any event.

Second, are four pictures, which were introduced in the record below, showing the remnants of the stone piers which supported the old wooden pedestrian bridge. These pictures represent the present physical condition of the bridge and Maiden Choice Run at the end of Primson Avenue today.

From the Deed, it is clear that the Petitioner owns to the center of the stream and that the City in fact does not own the bed of the stream or the land on the far side of the stream from Primson Avenue. From the pictures it is apparent that there was never street access to the subject commercial tract. It is obvious that the Petitioner can develop any type of access that it cares to so long as it does it at its own expense and that it does not attempt by litigation to transfer that whole burden to the taxpayers; or in the alternate, attempt to force the municipal zoning agency to grant a "special exception" (which is in fact rezoning) of the residential lot designated as Lot "P". The City is well aware of the directive of the Court of Appeals of Maryland in the last paragraph of its Opinion (A. 6a) to the effect that the City must act in good faith with respect to the construction of any bridge. The City will in good faith cooperate in an attempt to solve the problem within the limits of its legal powers and duties.

CONCLUSION

The Petitioner's allegation that the City's refusal to re-zone or grant a "special exception" to allow a commercial road across a residential lot to provide a cheaper commercial roadway to a commercial tract on the far side of a meandering stream in effect denied all access was not proven before the administrative body or the trial court and is in fact untrue. The stream is not on City land but is at least half on the Petitioner's land and thus it would have the responsibility of paying for the cost of any bridge at least to the center of the stream. Even without a large modern expensive bridge, which would sustain heavy construction equipment and tractor-trailers, the Petitioner has other means of access to the subject commercial tract and thus cannot allege that it is being denied all access. At the most, the Petitioner may be unable or unwilling to provide access for highly specialized types or equipment without a substantial outlay on its own part. There is no duty on taxpayers of a municipality to provide an easy form of access to private property.

Respectfully submitted,

GEORGE L. RUSSELL, JR.,
City Solicitor,
CLAYTON A. DIETRICH,
Chief Assistant Solicitor,
MARVIN M. POLIKOFF,
Attorneys for Respondents.

APPENDIX

APP. No. 228

THIS DEED, Made this 27th day of August in the year one thousand nine hundred and sixty nine, by and between Overbrook Development Company, a body corporate of the State of Maryland, party of the first part; and Leimbach Construction Corporation, a body corporate of the State of Maryland, party of the second part.

Witnesseth, that in consideration of the sum of five dollars and other good and valuable considerations, the receipt whereof is hereby acknowledged, the said party of the first part does hereby grant and convey unto the party of the second part, its successors and assigns, in fee simple, all that parcel of ground, situate, lying and being in Baltimore City, State of Maryland, and described as follows, that is to say:

Beginning for the same at the end of the fourth line of the parcel of land described in a deed from George P. Crist and wife to John F. Resendes and wife dated August 17, 1959 and recorded among the Land Records of Baltimore City in Liber JFC 696, folio 380 etc. said place of beginning being also in the fourth line of the land described in a deed from Manor Real Estate and Trust Co. to Philadelphia, Baltimore and Washington Railroad Co. dated October 14, 1914 and recorded among the Land Records of Baltimore County in Liber WPC No. 435 folio 346 etc. at a point distant 243.00 feet northwesterly from the end thereof and running thence, binding on a part of said last mentioned line reversely as now surveyed, North 36 degrees and 52 minutes West 147.37 feet to the southeasternmost outline of the land conveyed by Overbrook Development Co. to Philadelphia, Baltimore and Washington Railroad Co. by deed dated November 10, 1931 and recorded among the Land Records of Baltimore City in Liber SCL No. 5277 folio 455 etc.; thence, binding on the southeasternmost outline of the land conveyed by said last mentioned deed, the two following courses and distances, to wit: North 29 degrees and 13 minutes East 537.66 feet and North 33 degrees and 04 minutes East 544.26 feet to the end of the first line of the parcel

of land thirdly described in a deed from LePage's, Inc. to National Starch Products, Inc. dated July 2, 1956 and recorded among said Land Records in Liber MLP 10279 folio 573, etc.; thence, binding reversely on the first line of the land described in said last mentioned deed to the beginning thereof and continuing the same direction, in all, South 15 degrees and 24 minutes East 571.09 feet to the end of the second line of the land described in a deed from Mary E. Pietsch, widow, to Petfar Land Corporation dated February 1, 1949 and recorded among said Land Records in Liber MLP 7691 folio 141, etc. and to the center of Maidens Choice Run; thence, running with and binding on the third line of the land described in said last mentioned deed as the same calls to bind on the center of Maidens Choice Run, the four following courses and distances, to wit: South 71 degrees, 52 minutes and 30 seconds West 189.91 feet; South 59 degrees and 02 minutes West 86.00 feet; South 50 degrees and 15 minutes West 86.00 feet and South 39 degrees and 02 minutes West 61 feet to a point in line with the second line of the land described in the deed from George P. Crist and wife to John F. Resendes and wife firstly hereinbefore referred to; thence, still binding on or near the center of Maidens Choice Run and to and along the second line of the land described in said first mentioned deed, in all, South 44 degrees and 28 minutes West 45.00 feet and thence, running with and binding on the third and fourth lines of the land described in said first mentioned deed and in part along the center of said Run, the two following courses and distances, to wit: South 11 degrees and 55 minutes, West 93.50 feet and South 53 degrees and 08 minutes West 277.00 feet to the place of beginning. Containing 6.156 acres of land, more or less. (Ws Primson 629 — N. Wilkens)

Being part of the whole tract of land described in a deed from Louden Park Cemetery Co. to Overbrook Development Co., the grantor herein, dated December 17, 1912 and recorded among the Land Records of Baltimore City in Liber SCL 2790 folio 356, etc.

The courses in the above description are referred to the True Meridian adopted by the Baltimore Survey Control System.

Subject to the rights of the Mayor and City Council of Baltimore in and to certain rights of way for sewers under the terms of two agreements — one with Overbrook Development Co. dated December 4, 1935 and recorded among said Land Records in Liber SCL 3601 folio 47, etc. and another with Petfar Land Corporation and Overbrook Development Co. dated January 10, 1930 and recorded among said Land Records in Liber MLP 7989 folio 275, etc.

Subject also to any rights the Mayor and City Council of Baltimore may have in the bed of Primson Avenue as heretofore laid out through the above described property.

Together with the buildings and improvements thereupon erected, made or being and all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging, or anywise appertaining.

To Have And To Hold the said parcel of ground and premises, above described and mentioned, and hereby intended to be conveyed; together with the rights, privileges, appurtenances and advantages thereto belonging or appertaining unto and to the proper use and benefit of the said party of the second part, its successors and assigns, in fee simple.

And the said party of the first part hereby covenants that it has not done or suffered to be done any act, matter or thing whatsoever, to encumber the property hereby conveyed; that it will warrant specially the property granted and that it will execute such further assurances of the same as may be requisite.

Witness the corporate seal of said Grantor and the signature of its President.

OVERBROOK DEVELOPMENT COMPANY,
HARRY C. PRESBROEK, III
President

Test: (Corporate Seal)

GEORGE E. THOMSEN

State of Maryland, Baltimore City, to wit:

I Hereby Certify, That on this 27th day of August, 1969, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City personally appeared Harry C. Primrose, III who acknowledged himself to be the President of Overbrook Development Company, a corporation, and that he as such President, being authorized so to do, executed the within instrument for the purposes therein contained, by signing in my presence, the name of the corporation by himself as such President.

In Witness Whereof, I hereunto set my hand and official seal.

(Notary Seal) J. DARLENE WALTER,
Notary Public

My Commission expires: July 1, 1970.

Rec'd for record Oct. 23, 1969 9 A.M. and recorded in the Land Records of Baltimore City, Liber R.H.B. 2575, Page 142

ROBERT H. BOUSE,
Clerk

In the Superior Court of Baltimore City

State of Maryland, City of Baltimore, Sct.

I, ROBERT H. BOUSE, Clerk of the Superior Court of Baltimore City, do hereby certify that the aforegoing is a true copy of the original Deed taken from the records of the said Superior Court of Baltimore City as recorded in Liber R.H.B. No. 2575, Folio 142, one of the Land Records of Baltimore City.

In Testimony Whereof, I hereto set my hand and affix the seal of said Court, this 30th day of November A.D. 1970

ROBERT H. BOUSE,
Clerk of the Superior Court of Baltimore City.

(Seal)

PRINCE AVENUE OVER RAINEY
CHOICE BUS LOOKING SOUTH

LOOKING NORTH FROM SITE OF
PROPOSED DRIVEWAY

LOOKING EASTERLY FROM STREAM SHOWING SITE OF PROPOSED DRIVEWAY AND PRIDSO AVENUE

LOOKING NORTHEASTERLY TO OLD BRIDGE

LOOKING NORTHEASTERLY TO SITE OF OLD BRIDGE AND PROPOSED DRIVEWAY

LIBRARY
SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1970

No. 604

LEHRBACH CONSTRUCTION COMPANY,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
A MUNICIPAL CORPORATION, AND
HERTER O. SUPPINGER,

Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals of Maryland

PETITIONER'S REPLY BRIEF

Charles G. W. Atwater,
Mr. James A. Atwater,
406 One North Charles Street,
Baltimore, Maryland 21201,
Counsel for Petitioner.

The Daily Record Co., Baltimore, Md. 21202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 604

LEIMBACH CONSTRUCTION COMPANY,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
A MUNICIPAL CORPORATION, AND
BETTIE O. SUMMERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

Respondents' Brief in Opposition raises new issues of fact not previously presented in the record or in prior briefs. This Reply Brief is directed only to such issues.

In the City of Baltimore's Statement of the Case it is said that "apparently Maiden Choice Run is wholly within the Petitioner's property line."

It is further stated that the Petitioner in this proceeding attempted to obtain "a rezoning of Lot 'P' from Residential to Commercial."

Both of these statements are in error and are unsupported by the record.

The only issue argued in the Brief in Opposition is the factual issue of whether or not this property is denied all access. Respondents argue that there is no evidence in the record to support the allegations made in the Petition for Certiorari that the property is denied all access, and they file new exhibits with their brief which they allege support their position.

We shall endeavor to point out specifically from the record the errors in the Brief in Opposition.

ARGUMENT

I.

THE RECORD IS REPLETE WITH EVIDENCE SHOWING THERE IS A DENIAL OF ACCESS.

The references herein marked "E. ....." are to the Joint Record Extract originally printed and filed in the Court of Appeals of Maryland which was filed as part of the record in this Court.

The original application (E. 14, 15, 16) was as follows:

> "Install driveway and culvert across corner of lot 22 known as W. S. Primson Ave. 509′ 1″ N. Wilkins Ave."

This was paraphrased at the time of the hearing before the Board of Municipal and Zoning Appeals by the clerk to the Board, Mr. Rubin, at E. 20, where he refers to the application as one "for ingress and egress to the adjoining commercial lot."

The testimony of the first witness before the Board, Ernest J. Litty (E. 20), referring to the fact that there originally was a bridge across Maiden Choice Run, said:

> ". . . the City does not feel that it wants to rebuild the bridge. So, the only solution that I had, in order to get into the property, *there's no other access to the property*, was to acquire the piece of residential property alongside, in order to put a culvert over Maiden Choice Run, in order to get into the property." (Emphasis added.)

He was asked later by Mr. Cuccia, a member of the Board, whether there was any other way to get into the property, and he said, "Yes, but you have to go across the residential property there also" (E. 21).

The Chairman of the Board commented as follows (E. 24):

> "That's why the access would be into either of the two pieces of property which are commercial. He wants to store in there. I don't know how anybody is going to get into it unless they can go up through one of these blocks. The shortest way would be through Unetta Avenue."

Counsel for the protestants, Mr. McGuirk, commented (E. 28):

> "At the present time, I certainly can be sympathetic to anybody who cannot get use out of his property, but at the present time this property is being used by the children of the neighborhood. It's a shame that it has to be used in this particular way. We are going to recommend the City purchase this as a park. As it is now, *it is landlocked.*" (Emphasis added.)

The Board of Municipal and Zoning Appeals in its opinion referred to this as an application "to permit the construction of a driveway and metal culvert for ingress and egress to the adjoining commercial lot" (E. 38).

The Board then makes a specific finding of fact on the issue of access as follows:

> "The testimony shows that the only access to Lot 21 and Lot 10, shown on the plat filed with the Board, is on Primson Avenue" (E. 38).

The *nisi prius* judge, Anselm Sodaro, makes also this same finding of fact:

> "The testimony further showed that the only egress to Lot 10 and Lot 21, as shown on the plat, is on Primson Avenue; that a City bridge had been removed and without access the property cannot be used in conjunction with the proposed construction office and warehouse on the commercially zoned property; . . ." (E. 7).

The finding by the *nisi prius* court is fully supported by all of the testimony produced in the Baltimore City Court. We specifically refer to the statement of counsel at the top of E. 13 and to the testimony of Mr. Litty later on that page in answer to the direct question, as follows:

> "Q. What access does that property have to any public street as of the moment? A. None. There is no access at all. Primson, at one time, there was a bridge there which the City has removed, or someone has removed, so there's no access to the property bordering on the tracks, commercial property."

The question of the denial of access was not only raised in the brief of the Petitioner as appellant in the Maryland Court of Appeals, but was ruled on by the Court of Appeals in its opinion. The City Solicitor, remarkably, comments on this by noting that "Other types of access were now possible." We find it inconceivable that the City Solicitor's office seriously argues that commercial property has access when the only access for carrying in supplies and materials is by "pack-train" (257 Md. at p. 640).

II.

THE FACTUAL ARGUMENT BY THE CITY THAT THE PRIMSON AVENUE BRIDGE IS ON THE PETITIONER'S PROPERTY AND IS NOT A CITY BRIDGE IS NOT SUPPORTED BY THE RECORD.

All references from testimony at the Board of Appeals and the testimony in the Baltimore City Court and the finding by the Board of Appeals and the finding by the Baltimore City Court and the conclusions by the Court of Appeals of Maryland all refer to this as a City bridge (E. 7, 13, 18, 20, 25, 26, 38).

The addition of this issue at this stage in the proceedings appears to be improper. It is a violation not only of Maryland Rule 885* which governs questions which our Court of Appeals will decide, but it is also in violation of the rules of this Court and contrary to the decisions of this Court as to what questions will be considered. *Ellis v. Dixon*, N.Y. (1955), 75 S. Ct. 850, 349 U.S. 458, 99 L. Ed. 1231, Rehearing denied 76 S. Ct. 37, 350 U.S. 855, 100 L. Ed. 759.

Factually, accepting the new exhibits filed by the City Solicitor's office as properly before this Court, the deed to the Petitioner does not support the allegations of the Brief in Opposition that the Petitioner has title to the bed of Maiden Choice Run. The deed specifically binds *"in part"*

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* Maryland Rules of Procedure:

Rule 885. Scope of Review — Limited to Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

along the center of Maiden Choice Run. It also contains the following paragraph:

> "Subject also to any rights the Mayor and City Council of Baltimore may have in the bed of Primson Avenue as heretofore laid out through the above described property" (Brief in Opposition, p. 13).

Construction of this deed, with all possible inferences made in favor of the City's argument, shows Petitioner may have at most bare legal title to *part* of the bed of Maiden Choice Run, *subject to* the rights of the City to use the full platted street Primson Avenue.

CONCLUSION

The Petitioner is not seeking, as the City Solicitor would have this Court believe, to have the "taxpayers of a municipality to provide an easy form of access to private property." Petitioner is asking only that it may have access to its property at its expense so that it may not be denied all use of its property.

Baltimore City, in its brief, makes no effort to argue the merits of the petition in this case. It seeks only to raise a new issue of fact, unsupported by and contrary to the record. The City has not endeavored to show that the decision of the Court of Appeals of Maryland, if left undisturbed, will not result in taking of property without compensation.

The Petition for Certiorari should be granted by this Court so that it may review, on the merits, the constitutional issue involved.

Respectfully submitted,

CHARLES C. W. ATWATER,
MYLANDER & ATWATER,
Counsel for Petitioner.